Sabah Flour and Feed Mills Sdn Bhd v Pg Mohd Kamil Pg Jalaludin & Ors and another suit

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NOS K22–51 OF 2010 AND K22–210 OF 2010
ABDUL RAHMAN SEBLI J
29 NOVEMBER 2011

Civil Procedure — Action — Dismissal of action — Refusal of counsel to proceed with trial due to non-admission of documents — Whether plaintiff choose not to exercise right to be heard in proof of its claim — Whether proper for suit to be dismissed — Rules of the High Court 1980 O 92 r 4

Civil Procedure — Documents — Bundle of documents — Affidavit verifying list of documents — Failure to enclose bundles of documents with affidavit verifying list of documents — Whether breach of O 24 r 5(4) of the Rules of the High Court 1980 — Whether opponent may object to bundle of documents being produced as evidence — Whether requirements of O 24 r 5(4) may be dispensed with — Whether court has discretion to admit bundles of documents notwithstanding breach of O 24 r 5(4)

At the commencement of the trial and as counsel for the plaintiff was applying to produce the bundles of documents as evidence, counsel for the defendants raised an objection on the ground that there had been a breach of O 24 r 5(4) of the Rules of the High Court 1980 ('RHC') in that at the time the affidavits verifying list of documents were served on the defendants, they were not accompanied by the bundles of documents properly paginated and bound. The question was whether it is mandatory for the bundles of documents to be served together with the affidavits verifying list of documents. After the objection was sustained, the plaintiff applied for an interim stay of the order with a view to making a formal application for stay and appealing to the Court of Appeal. The application for stay was refused and the plaintiff's counsel refused to proceed with the trial. Hence the defendants asked for the plaintiff's case in both suits to be dismissed pursuant to O 92 r 4 of the RHC.

Held, dismissing the plaintiff's claim in both suits with costs:

(1) The position of the law is clear, ie if the documents are not served together with the affidavit verifying list of documents without the agreement of the other parties they cannot be tendered as evidence at the trial except by leave of the court (see para 2).

(2) The plaintiff offered no reason at all as to why the documents were not

bundled and served together with the affidavits verifying list of documents. It was fair to assume that the documents were already in the plaintiffs possession at the time these two actions were filed. Therefore there was no reason for the plaintiff not to serve them together with the affidavits verifying list of documents or to serve them piecemeal as was done in this case (see para 5).

(3) There were more than 2,500 pages of documents. To serve them only on 2 August 2011 when they could and should have been served together with the first affidavit verifying list on 19 January 2011 was grossly unfair to the defendants. The late service gave the defendants less than two months to inspect the documents in preparation for the trial, which was fixed to commence on 26 September 2011 (see para 6).

(4) The plaintiff could not hide behind the senior assistant registrar's ('SAR') direction. In the first place it was for the trial judge and not the SAR to dispense with the requirements of O 24 r 5(4) and this can only be done at the trial and when the documents are sought to be tendered as evidence. Valid reasons must be given for the court to exercise its discretion to waive compliance with the rule (see para 7).

(5) The court has a discretion to admit the bundles of documents notwithstanding the breach of O 24 r 5(4) but in the instant case there was no material before the court to exercise the discretion in favour of granting leave. Thus by operation of sub-r 5(5) the plaintiff must be precluded from tendering the documents at the trial (see para 9).

(6) To grant an adjournment in the circumstances would not have been expedient in the interest of justice. The proper order was to dismiss the claim rather than to strike it out. To strike out the case when the plaintiff had deliberately breached the rule and then refusing to proceed with the case despite being ordered to do so would be to allow an indolent litigant to have 'a second bite of the cherry'. It was immaterial that the merits of the case had not been heard. This is a case where the plaintiff choose not to exercise the right to be heard in proof of its claim (see para 14).

[Bahasa Malaysia summary

Pada permulaan perbicaraan dan ketika peguam plaintif memohon untuk mengemukakan ikatan dokumen sebagai keterangan, peguam defendan-defendan membuat bantahan atas alasan bahawa terdapat pelanggaran A 24 k 5(4) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') yang mana pada masa afidavit yang mengesahkan senarai dokumen telah disampaikan kepada defendan, ianya tidak disertakan bersama dengan ikatan dokumen yang tersusun mengikut mukasurat yang betul dan terikat. Persoalannya adalah sama ada ia adalah mandatori bagi ikatan dokumen disampaikan bersama dengan senarai afidavit yang mengesahkan dokumen. Selepas bantahan tersebut dibenarkan, plaintif memohon bagi penangguhan

interim bagi perintah tersebut dengan tujuan untuk membuat permohonan rasmi bagi penangguhan dan merayu kepada Mahkamah Rayuan. Permohonan penangguhan telah ditolak dan peguam plaintif enggan untuk meneruskan perbicaraan. Oleh itu, defendan memohon agar guaman plaintif dalam kedua-dua saman ditolak di bawah A 92 k 4 KMT.

Diputuskan, menolak tuntutan plaintif dalam kedua-dua guaman dengan kos:

(1) Kedudukan undang-undang adalah jelas, iaitu jika dokumen tidak disampaikan bersama dengan senarai afidavit yang mengesahkan dokumen tanpa perjanjian pihak yang satu lagi, ianya tidak boleh dikemukakan sebagai keterangan dalam perbicaraan kecuali dengan kebenaran mahkamah (lihat perenggan 2).

(2) Plaintif sama sekali tidak memberikan sebab mengapa dokumen tersebut tidak diikat dan disampaikan bersama dengan afidavit yang mengesahkan senarai dokumen. Ia adalah adil untuk menganggap bahawa dokumen telah berada dalam milikan plaintif pada masa kedua-dua tindakan ini telah difailkan. Oleh itu tiada sebab bagi plaintif untuk tidak menyampaikannya bersama dengan afidavit yang mengesahkan senarai dokumen atau menyampaikannya sedikit demi sedikit sebagaimana yang telah dilakukan dalam kes ini (lihat perenggan 5).

(3) Terdapat lebih daripada 2,500 muka surat dalam dokumen. Untuk menyampaikannya hanya pada 2 Ogos 2011 sedangkan ianya sepatutnya boleh dan harus disampaikan bersama dengan senarai afidavit pertama yang mengesahkan pada 19 Januari 2011 adalah tidak adil kepada defendan-defendan. Kelewatan penyampaian memberikan defendan-defendan kurang daripada dua bulan untuk memeriksa dokumen-dokumen sebagai persediaan untuk perbicaraan, yang telah ditetapkan bermula pada 26 September 2011 (lihat perenggan 6).

(4) Plaintif tidak boleh bersembunyi dengan alasan arahan Penolong Kanan Pendaftar ('PKP'). Pertamanya, ia adalah bagi hakim bicara dan bukan PKP untuk mengenepikan keperluan di bawah A 24 k 5(4) dan ini hanya boleh dilakukan ketika perbicaraan dan apabila dokumen hendak dikemukakan sebagai keterangan. Sebab-sebab yang sah perlu diberikan kepada mahkamah baginya menggunakan budi bicara supaya menepikan pematuhan peraturan (lihat perenggan 7).

(5) Mahkamah mempunyai budi bicara untuk menerima ikatan dokumen tanpa mengira pelanggaran A 24 k 5(4) tetapi dalam kes ini, tiada material di hadapan mahkamah baginya menggunakan budi bicara dalam menyokong memberi kebenaran. Oleh itu, melalui operasi

sub-aturan 5(5) plaintif mesti dihalang daripada mengemukakan dokumen-dokumen ketika perbicaraan (lihat perenggan 9).

(6) Untuk memberikan penangguhan dalam hal keadaan ini, adalah menjadi tidak wajar demi kepentingan keadilan. Perintah yang sewajarnya adalah untuk menolak tuntutan tersebut dan bukan membatalkannya. Untuk membatalkan kes sedangkan plaintif telah sengaja melanggar peraturan dan kemudian enggan meneruskan dengan kes walaupun telah diarahkan untuk berbuat demikian adalah seperti membenarkan litigan yang malas mendapat *a second bite of the cherry* (peluang kedua). Ia adalah tidak material bahawa merit-merit kes telah tidak didengar. Ini merupakan kes di mana plaintif memilih untuk tidak melaksanakan haknya untuk didengar bagi membuktikan tuntutannya (lihat perenggan 14).]

Notes

For a case on bundle of documents, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2829.

For cases on dismissal of action, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 121-135.

Cases referred to

Low Cheng Soon v TA Securities Sdn Bhd [2003] 1 MLJ 389, CA (refd)

Legislation referred to

Rules of the Court of Appeal 1994 r 18(4)(c)
Rules of the High Court 1980 O 24 r 5(4), r 5(5) O 35 r 4(2), O 92 r 4

Alex Decena (Lau Cheung Hoon and Azimi Yahya with him) (Jayasuriya Kah & Co) for the plaintiff.
Sugumar Balakrishnan (Natasha Isabelle S Balakrishnan with him) (Sugumar & Co) for the first, second and third defendants.
Sonny Durai (Allion Kitigan & Partners) (Sugumar & Co) for the third defendant in Suit No K22–210 of 2010.
Thomas Ting (Cindy Han with him) (Ng & Ting) for the fifth defendant.
Fourth defendant in person (a bankrupt).

Abdul Rahman Sebli J:

[1] These two cases were called on for hearing on 26 September 2011. At the commencement of the trial and as counsel for the plaintiff was applying to produce the seven bundles of documents as evidence, counsel for the first, second and third defendants raised an objection on the ground that there had been a breach of O 24 r 5(4) of the Rules of the High Court 1980 ('the Rules') in that at the time the affidavits verifying list of documents were served on the

defendants, they were not accompanied by the seven bundles of documents properly paginated and bound. The question is whether it is mandatory for the bundles of documents to be served together with the affidavits verifying list of documents. Order 24 r 5(4) of the Rules stipulates as follows:

> (4) Unless otherwise agreed by the parties, a party preparing his list of documents shall cause to be bound and paginated all documents disclosed in Schedule 1 Part 1 to be intituled 'List of Documents' and shall file and serve copies of the same on all other parties to the action whereupon the documents shall be deemed to have been inspected.

[2] Order 24 r 5(4) then provides that non-compliance with the above rule shall preclude the party in breach from tendering the documents at the trial except by leave of the court. The position of the law is thus clear, ie if the documents are not served together with the affidavit verifying list of documents without the agreement of the other parties they cannot be tendered as evidence at the trial except by leave of the court. In *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389 the Court of Appeal was dealing with r 18(4)(c) of the Rules of the Court of Appeal 1994 which reads:

> (4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including —
>
> (a) …
>
> (b) …
>
> (c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal …

[3] It was held that the rule is mandatory. This is what Alauddin JCA (as he then was) said at p 394:

> There is no doubt in our minds and we agree with learned counsel for the respondent that this rule is mandatory. There are abundant authorities decided in our courts to suggest that the word 'shall' when used in any legislation means 'obligatory'. However, we do not propose to cite these authorities. Suffice it for us to say that the word 'shall' used in r 18(4) of the Rules reflects a measure of mandatoriness in it. As this is a mandatory rule, it must therefore be strictly adhered to.

[4] Further down His Lordship went on to say:

> In our judgment, the importance of the Rules cannot be ignored as otherwise the courts will be faced with endless problems involving the administration of justice. Speaking of the importance of the Rules, the learned judge, Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor v Ho Toong Peng & Ors* [1977] 1 MLJ 120 had this to say (at p 121):

A There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules. *It should, I think, be realised by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever*, since they embody B the experience of the courts over the years in the cause of speedy and efficient administration of justice. (Emphasis added.)

[5] Order 24 r 5(4) is not a recent addition to the Rules. It has been there C since 2000. If the other parties to the action could take the trouble to comply with this rule I do not think it is fair for the plaintiff to be given a preferential treatment by excusing it from compliance. It is idle to say that justice is not only for the plaintiff but also for the defendants. The plaintiff offered no reason at all as to why the documents were not bundled and served together with the D affidavits verifying list of documents. Surely the documents were already in the plaintiffs possession as early as 19 January 2011, the date the first affidavit verifying list was served on the defendants. In fact it is fair to assume that the documents were already in the plaintiff's possession at the time these two actions were filed. Therefore there was no reason for the plaintiff not to serve E them together with the affidavits verifying list of documents or to serve them piecemeal as was done in this case.

[6] The documents in the seven bundles are by no means few. They involve more than 2,500 pages of documents. To serve them only on 2 August 2011 F when they could and should have been served together with the first affidavit verifying list on 19 January 2011 is grossly unfair to the defendants. The late service gave the defendants less than two months to inspect the documents in preparation for the trial, which was fixed to commence on 26 September 2011. Having regard to the legislative scheme of O 24 r 5(4) I do not think it is G permissible for the documents to be served separate from and at any time subsequent to the service of the affidavit verifying list of documents. If that is the proper construction to be given to O 24 r 5(4) what is there to stop a party from serving the documents at the eleventh hour? To give such construction will be to defeat the object behind O 24 r 5(4) which is to give the other party H sufficient time to study the documents listed out in the affidavit verifying list and to decide how best to deal with the evidence at the trial without the need to ask for a postponement.

[7] Counsel for the plaintiff strenuously argued that they were not in breach I of O 24 r 5(4) as they had served the documents on 2 August 2011 in compliance with the direction of the senior assistant registrar given on 21 June 2011 where the plaintiff was directed to file and serve the documents by 3 August 2011. With due respect to counsel the plaintiff cannot hide behind the senior assistant registrar's direction. In the first place it was for the trial judge

and not the senior assistant registrar to dispense with the requirements of O 24 r 5(4) and this can only be done at the trial and when the documents are sought to be tendered as evidence. Valid reasons must be given for the court to exercise its discretion to waive compliance with the rule. In the instant case the plaintiff had offered none whatsoever, either to the senior assistant registrar or to this court. The plaintiff was more concerned with defending its position that it did not breach the rule rather than to explain the breach.

[8] Further, it is to be noted that the direction given by the senior assistant registrar was actually given at the prompting of Mr Sonny Durai, counsel for the third defendant in Suit No K22–210 of 2010 who at the mention date requested the senior assistant registrar to urge the plaintiff to furnish the documents to the defendants. That was how the senior assistant registrar came to give the direction, not because the plaintiff wanted to comply with O 24 r 5(4). In any event the plaintiff was already in breach of O 24 r 5(4) when the case was mentioned before the senior assistant registrar on 21 June 2011. Clearly its compliance with the senior assistant registrar's direction does not alter the fact that the bundles of documents had not been served together with the affidavits verifying list of documents. It is rather odd that the plaintiff had to be 'urged' to serve the documents when it was its legal obligation to do so.

[9] The court has a discretion to admit the seven bundles of documents notwithstanding the breach of O 24 r 5(4) but in the instant case there was no material before the court to exercise the discretion in favour of granting leave. Thus by operation of sub-r 5(5) the plaintiff must be precluded from tendering the documents at the trial. The question of denying the plaintiff the right to produce the documents in order to prove its case does not arise at all. The plaintiff has only itself to blame for the predicament that it had found itself in.

[10] After the objection was sustained the plaintiff applied for an interim stay of the order with a view to making a formal application for stay. Much as I sympathised with the plaintiff's predicament I refused to grant the order for stay as there were no special circumstances to grant the order. The trial was then ordered to proceed but counsel for the plaintiff informed the court that they could not proceed with the trial. The trial was then adjourned to the afternoon at the request of the plaintiff.

[11] At the resumption of hearing in the afternoon counsel for the plaintiff informed the court that his instruction was to apply for an adjournment to enable the plaintiff to make an urgent application to the Court of Appeal to stay the trial of the two actions. The defendants objected to the application, saying they were ready to proceed and that their witnesses were present in court and willing to testify although this was disputed by counsel for the plaintiff. As there was no compelling reason to adjourn the hearing I refused to grant any

adjournment. Yet again counsel for the plaintiff informed the court that they could not proceed with the trial. This time the defendants asked for the plaintiff's case in both suits to be dismissed pursuant to O 92 r 4 of the Rules. This rule provides as follows:

> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[12] Order 35 r 4(2) of the Rules clearly provides that subject to para (6) the plaintiff shall begin by opening his case. Faced with the plaintiff's continued refusal to proceed with the trial what option did the court have? Was the court supposed to stay the proceeding, or to adjourn the case, or to strike out the case? I do not think any of the options would be consonant to right and justice. In fact in order to salvage the plaintiff's case counsels for the defendants had even suggested to the plaintiff that it withdrew the actions and to file afresh but the plaintiff insisted on the proceedings to be stayed or adjourned pending appeal to the Court of Appeal.

[13] In my view, by refusing to proceed with the case despite being ordered to do so, the plaintiff must be taken to admit that it had no evidence to prove its case against any of the defendants in either of the suits. This much was admitted by counsel for the plaintiff himself when he told the court:

> It is not possible for the plaintiff to prove its case without those crucial documents bearing in mind fraud and breach of fiduciary duty are being claimed against the first, second and third defendants and as to the fourth and fifth defendants, the claim against them is that they knowingly assisted the first and secod defendants in the breach of trust That is the position the plaintiff now faces as a result of Your Lordship's ruling allowing the preliminary objection.

[14] To grant an adjournment in the circumstances would not be expedient in the interest of justice. The case was commenced by the plaintiff and one week had been set aside for the trial and now the plaintiff was saying it could not proceed. While it is understandable why the plaintiff was unable to proceed with the case, nevertheless its failure to do so simply means that the claim had not been proved. In such situation the proper order in my view would be to dismiss the claim rather than to strike it out. To strike out the case when the plaintiff had deliberately breached the rule and then refusing to proceed with the case despite being ordered to do so would be to allow an indolent litigant to have, in the words of Mr Sugumar Balakrishnan 'a second bite of the cherry'. That is not a precedent that this court is prepared to set. It is immaterial that the merits of the case had not been heard. This is a case where the plaintiff chose not to exercise the right to be heard in proof of its claim.

[15] A striking out order would be more appropriate if no party to the action appeared when the case was called on, as envisaged by O 35 r 1(1) of the Rules or where the plaintiff had applied to withdraw the suit with liberty to file afresh and the other party had no objection. This is not the situation in the instant case. With the exception of the fourth defendant who is a bankrupt all parties to the action were present at the hearing and there was no application by the plaintiff to withdraw the case with a view to file afresh.

[16] I am mindful of the fact that to dismiss a claim for failure by the plaintiff to proceed with the case and without hearing evidence may appear to be unduly harsh but where the plaintiff candidly admits that he has no evidence to prove his case and refuses to proceed with the case, the court must dismiss the claim. That has to be so, otherwise every time evidence is ruled out during the course of a trial, a party can just refuse to proceed on the ground that without such evidence he cannot prove his case, and then sit back and wait for the court to strike out the case. That will effectively give him the opportunity to undo whatever breach of the rule, if any that he had committed earlier. To my mind that is a clear abuse of process warranting dismissal under O 92 r 4 of the Rules.

[17] For reasons aforesaid I am of the view that the justice of the case lies in dismissing the plaintiff's claim in both suits with costs.

Plaintiff's claim dismissed in both suits with costs.

Reported by Kanesh Sundrum